which calls for further investigation every statement in an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."

In *Bank Negara Malaysia v. Mohd Ismail & Ors.* [1992] 1 MLJ 400, the Supreme Court held, (at p. 408 D) that the principle of law aforesaid enunciated by Lord Diplock is applicable to all cases where a Judge has to decide a matter on conflicting affidavit evidence.

In all the circumstances, I reversed the order I had earlier made in chambers, dismissed the application to set aside the judgment in default of defence, and affirmed the judgment in default of defence entered against all the defendants. The second and the third defendants were also ordered to pay the costs of this application.

PUBLIC PROSECUTOR

v.

ABDUL MALIK B. MARAHAJI & ANOR.

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL APPEAL NO. T(42)-3 OF 1994]
26 APRIL 1994

CRIMINAL APPEAL: Charge of corruptly accepting gratification - Section 4(a) Prevention of Corruption Act 1961 - Acquittal - Whether acquittal based on proper grounds - Whether s. 4(a) imposes a condition that the accused must be "on official duty" before a finding of guilt thereunder can be made.

CRIMINAL PROCEDURE: Whether s. 161 of the Indian Penal Code in pari materia with s 4(a) of the Prevention of Corruption Act 1961.

CRIMINAL PROCEDURE: Defence of alibi - Notice not given to prosecution - Whether evidence tending to support alibi to be excluded - Section 420A CPC.

The two accused were jointly charged with an offence under s. 4(a) of the Prevention of Corruption Act 1961 (the Act) read with s. 34 of the Penal Code. Both the accused were policemen and the evidence showed that on 26 February 1990 at about 3.30 a.m the two went to the complainant's house, and on discovering that the latter was an illegal immigrant told her that she had to pay a fine or else she would be taken to the police station. The first accused then demanded RM150 from the complainant but eventually accepted RM100 offered him by the complainant.

The learned Sessions Judge acquitted and discharged both the accused on the ground that the RM100 was not received corruptly as the accused were then not on official duty. In so deciding the learned Judge relied on the Indian Court decision in *Upendra Chondhurry v. Emperor* [1917] AIR 850, a decision on s. 161 of the Indian Penal Code, which the learned Judge said was in *pari materia* with s.4(a) of the Act. It was ruled in that case that acceptance of money by a public servant outside his official functions did not amount to an offence under the said s. 161.

The Public Prosecutor appealed and the main issues were:

1. Whether s. 161 of the Indian Penal Code and s. 4(a) of the Prevention of Corruption Act 1961 were in fact in *pari materia*.
2. Whether the learned Sessions Judge was right in interpreting s.4(a) of the Act as imposing a condition that the two accused must be on official duty before they could be found guilty under the said section.

Held:

[1] The learned Session Judge was wrong in holding that s. 161 of the Indian Penal Code was in *pari materia* with s. 4(a) of the Prevention of Corruption Act 1961. Words like "official act" and "official functions" present in s. 161 are clearly absent from s. 4(a) of the Act and therefore the two sections cannot be said to be in *pari materia*.In any event it was improper of him to rely on *Upendra Nath Chondhurry v. Emperor* as the facts in that case were different and distinguishable from the facts of the present case.

[2] It is not a requirement of s. 4(a) of the Act that the two accused must be on official duty before they can found guilty of the offence under that section and the learned Sessions Judge had erred when he read s. 4(a) as imposing such a condition.

[3] The learned Sessions Judge was wrong in concluding that the presumption under s. 14 of the Act had been rebutted because the accused were not doing anything connected with their official duties. The two accused in this case came upon the complainant who had no valid travel document in which event they were empowered by s.. 20 (3)(a) of the Police Act 1967 and also by s. 23 of the Criminal Procedure Code and s. 51(3) of the Immigration Act 1963 to arrest the complainant. The two accused were in fact carrying out an official duty when checking the travel documents of the complainant. It was just that they did not arrest the complainant and for that they received RM100.

[Order of Acquittal set aside. Both accused convicted as charged].

Cases referred to:

Ku Lip See v. Public Prosecutor [1982] 1 MLJ 194 ***(refd)***

Upendra Nath Chondhurry v. Emperor [1917] AIR 850 ***(dist)***

Legislation referred to:

Criminal Procedure Code, ss. 23, 420A
Immigration Act 1959/1963, s. 51(3)
Penal Code, s. 34
Police Act 1967, s. 20(3)(a)
Prevention of Corruption Act 1961, ss. 4(a), 14
Penal Code, s. 161 (India)

For the public prosecutor - Hassan Abdul Ghani, DPP
For the accused - In persons

JUDGMENT

Ian H.C. Chin J:

This is an appeal against the learned Sessions Judge's order of acquittal of two policemen, Abdul Malik bin Marahaji ("the 1st accused") and Mahamod bin Ulangkaya Bongsu ("the 2nd accused"), made on 28 October 1991. The two accused were jointly charged, s. 34 of the Penal Code being invoked, that they on 26 February 1990 corruptly received RM100 to refrain from taking action against one Luisa bte Petrus ("PW1") for not having valid travel document legalising her stay in Malaysia, which is an offence under s. 4(a) of the Prevention of Corruption Act 1961. The evidence of this case had been correctly set out by the learned Sessions Judge in his judgment from which I will cite, and they are as follows. PW1 was asleep in her house on 26 February 1990 when at about 3.30 a.m. both accused, together with another person who was the driver of a vehicle no. SG 8959, came calling. They asked PW1 for her travel document and when the 2nd accused discovered that PW1 had no valid document he said to PW1 that she has to pay a fine or else she will be taken to the police station. PW1 then attempted to give RM20 to the 2nd accused who did not accept because the amount was not satisfactory and he demanded RM150. It was after this that PW1 went to her neighbour Tajuddin bin Shukor ("PW2") and borrowed RM100 which she gave to the 2nd accused who in turn handed the money to the 1st accused. The two accused then left in the car no. SG8959. PW2 confirmed that PW1 did on the said day and time take RM100 from him and had told him that it was for the police. Another witness, Udin bin Salleh ("PW3"), who was staying with PW2, confirmed the presence of the two accused and the said vehicle at the place and at about that time. A witness of the defence, one Sudirman bin Hj. Ali ("DW7") confirmed the fact that the two accused were at about that time on the said day not in their homes but the two accused and their relatives gave evidence

that they were at the relevant time at home. Since no notice was given as to this alibi evidence as required by s. 420A of the Criminal Procedure Code, this evidence, which tend to support alibi, must be excluded. See *Ku Lip See v. Public Prosecutor* [1982] 1 MLJ 194. It was upon those evidence that I have just referred to that the learned Sessions Judge, though he said he was satisfied that the prosecution had proved that the two accused did in fact receive RM100 from PW1, came to the conclusion that the money was not received corruptly and that, therefore, the presumption of s. 14 of the Act had been rebutted. Some of the prosecution witnesses had given evidence that it was not the duty of the two accused to check documents to see whether passes had been issued for people to remain in Sabah. According to these witnesses, the 1st accused was a marine policeman and that his duties were primarily performed on board boats at sea or at the dockyard after the boat had berthed while the 2nd accused was a member of the police field force and that the 2nd accused was not at that time being assigned the duty of checking passport. The learned Sessions Judge had relied on *Upendra Nath Chondhurry v. Emperor* [1917] A.I.R. 850, which held that:

> ... acceptance of money by a public servant a motive for showing disfavour to a person, not in the exercise of but entirely outside his official functions does not amount to an offence under s. 161 ...

and concluded that though the two accused may have committed other offence, they are not guilty of the offence under s. 4(a) of the Prevention of Corruption Act 1961, because at the relevant time they were not on official duty and were not doing any official act. This is what the learned Sessions Judge, after referring to the Police Act 1967, the Criminal Procedure Code and the Immigration Act 1963, said:

> ... Apa yang dapat dilihat di sini, selepas mengkaji akan perbuatan kedua-kedua OKT serta melihat kepada peraturan Undang-Undang ini, jelas kepada kita bahawa kedua-dua OKT ini tidak menjalankan suatu tugas yang boleh dianggap sebagai tugas rasminya. Tiada apa-apa arahan diberikan oleh pegawai atasan kepada kedua-dua mereka untuk memeriksa passport di tempat dan masa yang diperkatakan. OKT (1) bertugas di Cawangan Marin dan OKT (2) di Pasukan Polis Hutan yang mana bidang-tugas khusus mereka adalah jauh berbeza dari apa yang telah mereka lakukan. Seandainya kesalahan ini dilakukan di satu tempat check-point atau pemeriksa polis di satu sekatan di jalanraya atau mereka adalah anggota polis tugas am kedudukan perkara mungkin berbeza. Tiada apa-apa operasi dijalankan oleh pihak polis di kawasan itu pada sekitar waktu itu ... Sudah pasti suatu pemeriksaan seperti ini bukan saja perlu dilaksanakan dalam bentuk satu opersai, malahan mestilah di dalam pengetahuan di samping arahan dari pihak atasan. Ini kesumuanya tidak ada ...

It would appear from the passage that I have just quoted that the learned Sessions Judge was of the opinion that what the two accused did, that is the checking of passports, cannot be regarded as their official duties because there was no operation at that time to ferret out illegal immigrants and the two accused were also not ordered by the superiors to carry out the task of checking passports. On that basis and relying on Upendra *Nath Chondhurry v. Emperor,* which was a decision on s. 161 of the Indian Penal Code and which the learned Sessions Judge held to be in *pari materia* with s. 4(a) of the Prevention of Corruption Act 1961, the learned Sessions Judge acquitted the two accused. In order to appreciate the statement of law quoted and relied on by the learned Sessions Judge, the facts of *Upendra Nath Chondhurry v. Emperor* had to be recounted and I can do no better than to cite the headnote and the relevant passages of that case, *viz*:

> Penal Code (45 of 1860). s. 161 - Accepting money to do act outside official function is no offence - Constable accepting money to thrash person is not an offence under s. 161. Where a Hcad Constable accepted two rupees on condition that he would send for and give a thrashing to a certain person:
>
> Held: that he was not guilty of an offence under s. 161, I.P.C.
>
> ...
>
> Sanderson, CJ - ... The offence with which he was charged was one under s. 161, I.P.C., and in order to convict him of that offence, it must be proved that he accepted the two rupees:
>
> > as a motive or reward for doing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering, or attempting to render, any service or disservice to any person ...
>
> ... the two rupees were given to the Head Constable not for the purpose of inducing him to do an official act or to show favour or disfavour

to any person in his official capacity, but on the condition that the Head Constable would send for Madan's enemy and give him a thrashing. That cannot be said to be anything done by the Head Constable in his official capacity. It certainly would be showing disfavour to Madan's enemy but could not be showing disfavour in his official capacity. It would be doing something entirely outside his official functions ...

Is s. 161 of the Penal Code really in *pari materia* with s. 4(a) of the Act ? The said s. 161 reads:

Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Central or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government Company referred to in s. 21, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both ...

whereas s. 4(a) of the Prevention of Corruption Act 1961 reads:

4(a) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Act done or foreborne to do so, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business, he shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

Words like "official act" and "official functions" present in s. 161 of the Indian Penal Code are absent from s. 4(a) of the Act and therefore, the two sections cannot be said to be in *pari materia*. What the learned Sessions Judge did was to read s. 4(a) of our Act as imposing a condition that the two accused must be on official duty or must at least had been directed by their superior to check the complainant's travel documents before the two accused can be guilty of an offence under s. 4(a) of the Act. Such a construction cannot be justified by the plain meaning of the words in s. 4(a) of the Act. Though s. 161 of the Indian Penal Code appears to require an accused person to be doing an "offical act" or exercising his "official functions", those requirements are not present in s. 4(a) of the Act. It is therefore not a requirement that the two accused must be on "official duty" before they can be guilty of the offence under s. 4(a) of the Act. I may add that it does not even matter if the two accused had been off-duty. Neither is it necessary, for the reason I shall state later, that they must be acting on the instruction of their superiors. In any event, the facts of *Upendra Nath Chondhurry v. Emperor* are entirely different from the facts of the present case. It will be recalled, in that case a constable was asked to thrash someone in return for two rupees which thrashing obviously cannot be regarded as the official act or function of a constable. But in the present case, the two accused came upon the complainant who had no valid travel document in which event the two accused were empowered by s. 20(3)(a) of the Police Act 1967, by s. 23 of the Criminal Procedure Code and s. 51(3) of the Immigration Act 1959/1963 to arrest the complainant. The two accused were in fact duty bound to arrest the complainant without having to await for the orders of their superiors. They did not arrest the complainant and for that they received RM100. Therefore, even if it can be read into s. 4(a) of the Act that the two accused must be on official duties, a proposition I do not agree, the two accused were carrying out an official duty when checking the travel document of the complainant and the absence of orders from their superiors do not make their duty less of an official one. The learned Sessions Judge is therefore clearly wrong in coming to the conclusion that the presumption of s. 14 of the Act had been rebutted because the two accused were not doing anything connected with their official duties.

I have examined the evidence and I am satisfied that the evidence of the complainant were corroborated in the material aspects. The learned Sessions Judge was, for the reasons stated above, wrong in acquitting the two accused. I therefore set aside the order of acquittal and instead convict the two accused of the offence charged. I will now hear the two accused before I pass sentence.